Supreme Court, U.S.
FILED
SEP 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-327

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JOHNNY WARD,
Petitioner,

v.

L & C MARINE TRANSPORT, LTD.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO REVIEW

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QUESTION PRESENTED FOR REVIEW

Respondents, being dissatisfied with the presentation by Petitioners of the question presented for review, point out to this Honorable Court that the Petitioners present one question for review but argue another. Further both the question presented and the question argued by Petitioners are so vague as to be almost incomprehensible.

It appears to Respondents that Petitioners are in reality asking this Court to provide a further review of the findings of fact of the District Court and determine whether or not they were clearly erroneous. That is unquestionably not the function of this Court. Apparently realizing this, Petitioners in their Argument raise the question, unmentioned in the Question Presented for Review, of an alleged conflict among the circuits in the application of the standard of review prescribed by Rule 52(a), Fed. R. Civ. P.

If Petitioners have stated any question for review, it can only be whether the Court of Appeals for the Eleventh Circuit applied the correct standard in reviewing the findings of fact of the District Court. Respondents believe that there is no question that it did and that there is no basis for this Court to review the case.

LIST OF ALL PARTIES

Since the Petition for Writ of Certiorari does not contain the names of all parties to the proceeding in the Court of Appeals for the Eleventh Circuit, Respondent lists them herewith:

L. & C. Marine Transport, Ltd.
Oswego Latex Carrier Corp.
The Firestone Tire & Rubber Company
Marine Transport Management, Inc. (formerly known as Marine Transport Lines, Inc.)
Marine Transport Lines, Inc. (formerly known as General American Transportation International Finance Corporation).

Complainants-Appellees-Respondents

Johnny Ward
Linda Ward
Robert Freeman

Claimants-Appellants-Petitioners

Reliance Insurance Company

Claimant (Subrogated Worker's Compensation Insurer)

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BRIEF FOR RESPONDENTS IN OPPOSITION TO REVIEW

STATEMENT OF THE CASE

Petitioners JOHNNY WARD and ROBERT FREEMAN were longshoremen who were injured aboard the M/V OSWEGO PLANTER on May 26, 1981. Petitioner WARD and his wife filed suits in the Superior Court of Chatham County, Georgia, on September 25, 1981, claiming negligence on the part of the vessel interests under 33 U.S. Code § 905(b). They sought damages totalling $103,000,000.00. Owners and operators of the ship filed a Petition for Exoneration from or Limitation of Liability, pursuant to 46 U.S. Code §§ 183-189, in the United

States District Court for the Southern District of Georgia. A bond was posted and the District Court enjoined other suits. Petitioners filed claims for damages in excess of $103,100,000.00 in the exoneration/limitation proceeding and answers denying that the vessel interests were entitled to exoneration or limitation. Additional vessel interests intervened as Complainants in the exoneration/limitation proceeding when the WARDS named them as defendants in the Superior Court suit.

WARD and FREEMAN were injured during an operation in which their gang of longshoremen were on one of the ship's masthouses, lowering a ship's boom to rig it for use in cargo operations. The longshoremen lost control of the boom. As a result the boom fell, and this further resulted in a quantity of wire being pulled onto an unpowered reel at high speed. The rapid movement of this wire injured the two men.

The booms are raised and lowered as follows: A steel cable, known as the topping lift wire, runs through the head of the boom to an unpowered winch, known as the topping lift reel, on the masthouse, and is affixed by threading the other end of the wire (known as the bitte end or dead end) through a hole in the spool of the topping lift reel and clamping it to prevent its pulling out. Unreeling the topping lift wire allows the head of the boom to come down. Reeling in pulls it up. The spool of the topping life reel is divided into two parts by a steel divider plate. By affixing another steel cable, known as the bull wire, to the spool on the other side of the divider plate and applying a source of power to move the bull wire, the boom can be raised or lowered depending upon whether one winds the bull wire onto the spool or unwinds it. The topping lift reel is equipped with a ratchet which rotates with the spool. When the boom is in the desired position, a locking bar, which operates by gravity, can be dropped into the teeth of the ratchet, locking the boom in place. In order to raise or lower the

boom, this locking bar must be lifted out of the teeth of the ratchet. This locking bar, although sometimes referred to as a brake bar, is not intended for use in stopping or braking a falling boom.

Also on the masthouse are four electrically powered winches which provide power in loading and unloading cargo. Each winch is also fitted with a drum having the shape of a concave cylinder which rotates when the winch is operated. These drums are known as gypsies or gypsyheads. On the OSWEGO PLANTER, each gypsyhead has a slot through which cables can be passed and secured. The securing is normally by a shackle attached to the end of the bull wire which prevents the bull wire from pulling through the slot on the gypsy.

Each of the four booms on the OSWEGO PLANTER is supplied with a bull wire and shackle. When not in use, the bull wires, with the shackles affixed to one end, are coiled up and placed on the top of the topping lift reels.

The longshoremen failed to shackle the bull wire to the gypsy and to wind the bull wire onto the gypsy. Instead, they took the bull wire and made several turns around the gypsy, with Petitioner FREEMAN then feeding the bull wire around the gypsy to let the boom down. The excess bull wire was scattered on the masthouse deck. FREEMAN lost control of the bull wire which deprived the longshoremen of any control of the boom. The boom fell, pulling the bull wire onto the topping lift reel. The rapid drawing of the bull wire onto the topping lift reel injured Petitioners.

The exoneration/limitation proceeding went to trial before the District Court, sitting without a jury, on January 30, 1984 and was completed on February 2, 1984. Claimants-Appellants-Petitioners WARD and FREEMAN claimed that the vessel interests were negligent in numerous respects including:

1. Providing defective and malfunctioning cargo gear consisting of an inoperative and bent locking pawl bar on the topping lift reel;

2. Providing defective and malfunctioning cargo gear consisting of an inoperative topping lift reel that had no functioning braking device;

3. Providing defective and malfunctioning cargo gear consisting of a rusty, worn, bent, ill-cared for bull wire rope which was strewn and ill-stored over the mast house deck;

4. Providing a work space that was insufficient, encumbered, dangerous and unsafe due to a gerry (sic) rigged ill-placed green wooden box;

5. Providing a work area that had a poorly cared for work deck which was slippery;

6. Failing to assist or supervise cargo operations;

7. Failing to provide safe and proper cargo gear to include a complete bull wire and shackle;

8. Failing to provide proper and safe cargo gear and work area and failing to warn of that fact.
(Excerpted from Petitioners' listing of each act of negligence in Pre-Trial Order).

In addition, Petitioners contended that the vessel was negligent:

9. In coming into port with the cargo gear not rigged so that the longshoremen had to rig it.

On March 23, 1984, the District Court rendered comprehensive findings of fact and conclusions of law, ruling that there was no negligence on the part of the vessel interests under the applicable legal standard set forth by this Honorable Court in *Scindia Steam Navigation Co. v. Santos*, 451 U.S. 156 (1981), and subsequent appellate decisions based on *Scindia*. The District Court found

that Petitioners' injuries flowed directly from the negligence of the longshoremen in failing to shackle the bull wire to the gypsy in violation of 29 CFR § 1918.54(e) and in failing to engage the locking bar on the topping lift reel. It found that the ship's gear was in proper operating condition; that the work area was reasonably safe; that the rigging system was familiar to the longshoremen and no hidden dangers requiring warning were present; and that the shipowner had no knowledge of the negligence of the longshoremen.

On appeal to the United States Court of Appeals for the Eleventh Circuit, Petitioners urged that the District Court's findings of fact were clearly erroneous in:

1. Not finding that the presence of a wooden box prevented JOHNNY WARD from escaping from the loose bull wire and that this box made the work area insufficient

2. Not finding that the locking bar of the topping lift reel was not in working condition prior to the accident

3. Not finding that the fact that the longshoremen had to rig the cargo gear constituted causative negligence.

One other factual error not related to negligence and one legal error were urged before the Court of Appeals.

The Court of Appeals reviewed the record and concluded that the District Court's findings of fact were not clearly erroneous. *L. & C. Marine Transport, Ltd. v. Ward*, 755 F. 2d 1457 (11th Cir. 1985). It examined each of the above three contentions individually and rejected them. Petitioners have, before this Court, raised only the first issue of fact, namely the presence of the wooden box preventing WARD's escape. The Court of Appeals reviewed the District Court's findings on that issue and pointed out that from the full record, it ap-

peared that (1) other avenues of escape were available and (2) there was adequate evidence to conclude that the accident happened too quickly for WARD to have escaped in any direction. Even more importantly, the Court of Appeals pointed out that the cause of the accident was the negligence of the longshoremen in failing to shackle the bull wire to the gypsy and to engage the locking bar of the topping lift reel. To impose liability for the presence of the wooden box would require the vessel to foresee the negligence of the longshormen.

This Petition for Writ of Certiorari followed. The alleged error relates to the determination of the Court of Appeals that the findings of fact of the District Court with respect to the wooden box were not clearly erroneous.

SUMMARY OF THE ARGUMENT

Respondents view the Petition for Certiorari as requesting review in two respects. First, in the Question Presented, Petitioners appear to be asking this Court to engage in a further review of the factual findings of the District Court. Second, in the Argument, Petitioners seem to contend that there is a conflict among the circuits in the application of the standard of review of factual findings prescribed by Rule 52(a), Fed. R. Civ. P. Respondents do not believe either matter merits review by this Court.

In connection with the Question Presented, Respondents point out that this Court is intended to correct errors of law, not errors in fact finding. Under the two-court rule, this Court accepts findings in which two courts concur unless clear error is shown. The opinion of the Court of Appeals for the Eleventh Circuit plainly shows that it carefully reviewed the record in considering Petitioners' argument that the District Court's finding on the factual issue in question was clearly erroneous, and found not only that it was not clearly erroneous but that a contrary finding would not form a legal basis for liability.

In connection with the Argument of a conflict among the circuits, Respondents believe that there is no such conflict. The Court of Appeals employed the standard prescribed by Rule 52(a) and so stated by this Court. The alleged conflict is purely imaginary. The cases from other circuits, cited by Petitioners, do no more than state the standard in slightly different language. There can be no doubt that the Eleventh Circuit Court of Appeals correctly stated and correctly employed the standard.

Petitioners' argument of a conflict among the circuits, not stated in the Question Presented, is a feeble attempt to provide a basis for review where none exists. U.S. Supreme Court Rule 17 sets forth the considerations governing review on certiorari. None of the considerations listed are raised in the Question Presented. Only as an afterthought, Petitioners have argued that there is a conflict among the circuits. This alleged conflict is absolutely nonexistent and argued solely in an attempt to find a basis for review where none exists.

ARGUMENT

I. PETITIONERS' IMPLIED REQUEST IN THE QUESTION PRESENTED THAT THIS COURT REVIEW THE FINDINGS OF FACT

Simply put, Petitioners are dissatisfied with the findings of fact of the District Court and the decision of the Court of Appeals that found them not to be clearly erroneous. They therefore ask this Court to provide yet another level of review of the findings of fact.

That is not the function of this Court. Where this Court is not acting as the initial appellate court, its role is the declaration of the supreme law of the land, 5A *Moore's Federal Practice* ¶ 52.12, pp. 52-202 and 203. For that reason, this Court has adopted a rule under which it accepts findings in which two courts concur unless clear error is shown, *Pick Mfg. Co. v. General*

Motors Corp., 299 U.S. 3 (1936). As this Court stated in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271 (1949)

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.", 336 U.S. at 275.

See also *Great Atlantic & Pacific Tea Co. v. Supermarket Equip. Corp.*, 340 U.S. 147, 153 (1950).

The opinion of the Court of Appeals, 755 F. 2d 1457 (11th Cir. 1985), demonstrates that it gave very careful consideration to Petitioners' contentions that certain findings of fact of the District Court, including the one complained of in the Question Presented here, were clearly erroneous. On that particular finding, that is, that the wooden box did not prevent WARDS escape, the Court of Appeals stated that it examined the full record, 755 F. 2d at 1462, and was not convinced that the findings were clearly erroneous. It went on to point out that the evidence showed that other avenues of escape were available and that the evidence also supported the conclusion that the accident happened too quickly for WARD to have escaped in any direction. Moreover, the Court of Appeals stated that the evidence in the record more than adequately supported the conclusion of the District Court that the longshoremen's failure to use a shackle and to engage the locking bar was the proximate cause of the injuries. To impose liability based on the placement of the wooden box would thus impose on the vessel owner a duty to anticipate the negligence of the longshoremen. The Court of Appeals noted that Petitioners cited to no precedent for this proposition.

II. PETITIONERS' ARGUMENT THAT THERE IS A CONFLICT AMONG THE CIRCUITS IN THE APPLICATION OF THE STANDARD FOR REVIEWING FINDINGS OF FACT

Petitioners argue that the Court of Appeals directly contravened this Court's standard for review of findings of fact set forth in *United States v. United States Gypsum Co.*, 333 U.S. 364 (1947). Respondents point out that the Court of Appeals directly quoted this Court's standard as set forth in *United States v. U.S. Gypsum* in reviewing the findings of fact, 755 F. 2d at 1461. It is evident that the Court of Appeals utilized the correct standard of review. See also *McAllister v. United States*, 348 U.S. 19, 22-23 (1954).

Petitioners' citation of *W.R.B. Corp. v. Geer*, 313 F. 2d 750, 753 (5th Cir. 1963) and *St. Louis Testing Laboratories, Inc. v. Mississippi Valley Structural Steel Co.*, 375 F. 2d 565, 567 (8th Cir. 1967) as evidence of a conflict among the circuits affords no basis for review by this Court.

First, there is no question that the Eleventh Circuit utilized the standard prescribed both by this Court in *U.S. Gypsum*, 333 U.S. at 394-395 and by Rule 52(a), Fed. R. Civ. P. Hence there is no possible error to review. Second, a reading of the allegedly conflicting applications of the "clearly erroneous" standard in the Fifth and Eighth Circuits reveals that there is in truth not even a suggestion of conflict. In *W.R.B. Corp.*, the Court of Appeals for the Fifth Circuit simply held that the District Court, in reviewing a master's findings of fact, had not employed the "clearly erroneous" test (prescribed for that case by Rule 53(e)(2), Fed. R. Civ. P.), 313 F. 2d at 753. In *St. Louis Testing*, the Eighth Circuit merely applied the principle of the "clearly erroneous" standard in language which did not quote precisely the statement of the standard from *U.S. Gypsum* and Rule 52(a). There is absolutely nothing in either

of these cases to indicate that there is any conflict in the application of the standard.

CONCLUSION

This Court is a Court of the correction of errors of law, not errors in fact finding. The District Court and the Court of Appeals have found the facts adverse to Petitioners. Under the two-court rule, there is no reason for this Court to provide Petitioners with yet another level of review of the facts.

There is no conflict among the circuits as to the application of the "clearly erroneous" standard, requiring resolution by this Court. The Eleventh Circuit Court of Appeals correctly applied the standard prescribed by this Court and by the Federal Rules of Civil Procedure.

There is no basis for this Court to review this case. None of the considerations of Rule 17 are remotely involved. The argument of a conflict among the circuits is merely an attempt to create a basis for review where none exists. The petition for writ of certiorari should be denied.

Respectfully submitted,

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